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A hoped for coherent and permissive EU religious freedom policy: the *Bougnaoui* and *Achbita* cases¹

Jessica Giles^{*}

The Court of Justice of the European Union (CJEU) has before it two similar cases, one from France and the other from Belgium, in which Advocate General Sharpston (UK) and Advocate General Kokott (Germany) have given their respective opinions. The cases are of interest in and of themselves because they provide the CJEU with the opportunity to examine religion as a protected characteristic under the operation of the Anti-Discrimination Directive, Council Directive 2000/78/EC. In addition they are important from a comparative perspective due to the Advocate Generals' contrasting opinions on the protection accorded to religious believers within equality legislation which classes religious belief as a protected characteristic. This article will consider the Advocate Generals' different approaches to the extent of protection enjoyed by those seeking to manifest their religion within a private employment context and examine some of the practical and theoretical issues to which the cases give rise.

The two cases sit against a background that Advocate General Kokott in *Achbita and another v G4S Secure Solutions NV* (Case C-157/15) 31 May 2016, the reference from Belgium, describes in her opinion at paragraph 2 as:

'The legal issues surrounding the Islamic headscarf are symbolic of the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, how much assimilation it is permitted to require from certain minorities.'

And in paragraph 6, referring to the parallel case of *Bougnaoui and another v Micropole SA* (Case C-188/15) 13 July 2016, which originated in France:

'In both cases, the Court is expected to give a landmark decision the impact of which could extend beyond the specific context of the main proceedings and be ground breaking in the world of work throughout the European Union, at least so far as the private sector is concerned.'

Ms Samira Achbita, a Muslim throughout her contract of employment, was employed in Belgium by G4S Secure Solutions NV (G4S), a company providing, *inter alia*,

¹ This case comment is longer than the usual format for PILARs case comments. It was decided to publish in this format online to enable publication prior to the handing down of the decisions of the Court of Justice of the European Union in these cases.

^{*} SFHEA, Barrister, Law Lecturer at the Open University

security and reception services to customers from the public and private sectors. Ms Achbita's contract was one of indefinite duration.

G4S had a policy, applicable at the commencement of Ms Achbita's contract as an unwritten company rule, that employees were not permitted to wear any religious, political or philosophical symbols while on duty. A written formulation of this policy was incorporated into the G4S employee code of conduct three years after Ms Achbita's employment commenced. This read:

'Employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them'.

For the first three years Ms Achbita wore a headscarf outside work, but in 2006 she notified the company that she would be wearing a hijab (a headscarf covering the head and neck, but not the face) to work. This resulted in her dismissal one month later. She brought a claim for wrongful dismissal seeking alternatively damages for infringement of the law to combat discrimination. Both the court of first instance and the appeal court dismissed her claim on the basis that there was no indirect or direct discrimination and her dismissal could not be regarded as manifestly unreasonable or discriminatory since G4S was not under an obligation to assume that its ban was illegal. On an appeal in cassation the Court of Cassation, Belgium, referred the following question to the CJEU:

'Should article 2(2)(a) of Directive 2000/78/EC be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace'.

Article 2 of the Directive reads:

'Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

Article 1 provides that the purpose of the Directive is to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation with a view to putting into effect in the Member States the principle of equal treatment. National implementing legislation incorporated these provisions into national law.

A parallel case concerning the wearing of the Muslim veil in a place of employment in the private sector arose in France and was referred to the CJEU. In that case Ms

Asma Bougnaoui, a Muslim, was employed as a design engineer by Micropole SA. In her interview Micropole made it clear to her that she would not be able to wear her veil in all circumstances in the interests of the business and for its development. Micropole explained that they were required to ask employees to use discretion concerning the expression of their personal preferences.

After a client had explained to the company that Ms Bougnaoui's wearing of the veil had embarrassed a number of their employees and that Ms Bougnaoui should not wear a veil the next time she attended them, Micropole requested that she did not wear her headscarf when she was in contact with customers of the business. Micropole cited the principle of necessary neutrality, which they required to be applied as regards their clients. Mrs Bougnaoui refused to comply with this request and Micropole terminated her contract of employment.

The national court of first instance and the appeal court found that the dismissal was lawful. On the claimant's appeal to the Court of Cassation, the court referred the following question to the CJEU:

'Must article 4(1) of [Directive 2000/78] be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?'

Article 4(1) of the Directive reads:

'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.

The Advocate Generals' opinions

Bougnaoui

Advocate General Sharpston, in *Bougnaoui*, drew a clear distinction between freedom to manifest one's religion, which included the freedom to wear religious symbols at work, and the ability to proselytise. In her opinion an employer was free to prohibit proselytism at work, whereas they could only limit the manifestation of religion in specific circumstances. She emphasised that she did not regard wearing religious symbols or attire as proselytism.

She explained that she viewed the argument that just because an individual was wearing a religious garment (or was black or a woman) that they could not properly

undertake their role at an organisation as “pernicious”² but that the wearing of the headscarf was an expression of cultural and religious freedom.

In answer to the question of whether a customer’s request that one of the firms’ employees should not wear a hijab could be a genuine occupational requirement so as to justify religious discrimination, the Advocate General’s answer was that it could not.

She reached this view by first concluding that freedom to manifest one’s religion (*forum externum*) as well as freedom to believe whatever one wants (*forum internum*), was covered by the prohibition against discrimination in Directive 2000/78. This was by analogy with European Court of Human Rights case law whereby the right to manifest one’s religion was intrinsic to the freedom of religion itself. She then concluded that since someone who had not chosen to manifest their religion by wearing religious apparel would not have been treated in the same manner as Mrs Bouganoui, that Mrs Bouganoui had been directly discriminated against.

The Advocate General then went on to explore whether any of the derogations laid down in the Directive applied. Addressing first whether the measure could be a genuine and determining occupational requirement pursuant to article 4(1) she concluded that the prohibition on the wearing of the hijab at the request of the client could not fulfil the requirements of this provision. Although the restriction was provided for by French law, and was based on a characteristic related to religious belief, restrictions under article 4(1) had to be interpreted strictly, the objective had to be both legitimate and the requirement proportionate. Article 4(1) could not be used to justify a blanket exception for all the activities that a given employee may potentially engage in. The restriction had to be both ‘genuine’ and ‘determining’ so that the derogation must be limited to matters that were absolutely necessary in order to undertake the professional activity in question³. In this regard it would be acceptable for an employer to refuse to allow a Muslim employee to wear a hijab around machinery where to do so would create a dangerous situation. There was, however, no basis on which the grounds which Micropole appeared to advance in Ms Bougnaoui’s dismissal letter, namely the commercial interest of its business in its relations with its customers, that could justify the application of the Article 4(1) derogation. This was because direct discrimination could not be justified on the grounds that otherwise financial loss might be caused to the employer. Second at paragraph 100:

‘... whilst the freedom to conduct a business is one of the general principles of EU law and is now enshrined in Article 16 of the Charter, the Court has held that that freedom ‘is not an absolute principle but must be viewed in relation to its function in society ... Accordingly, limitations may be imposed on the exercise of that freedom provided, in accordance with Article 52(1) of the Charter, that they are prescribed by law and that, in accordance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others’.

² *Bougnaoui*, para 74.

³ *Bougnaoui*, para 96.

Thus other rights would and had been⁴ given priority over freedom to conduct a business.

Similarly here the freedom to conduct a business could not, according to Advocate General Sharpston, cause the limitation upon Mrs Bougnaoui's freedom to manifest her religion to amount to a genuine and determining occupational requirement. To rule otherwise would 'normalise' the derogation proposed by Micropole⁵. There was nothing to suggest that because she wore an Islamic headscarf Mrs Bougnaoui was unable to perform her duties as a design engineer – her dismissal letter had, on the contrary, referred to her competence in this area.

Since none of the other derogations under the Directive were applicable, the discrimination was, according to the Advocate General, therefore unjustified direction discrimination⁶.

Advocate General Sharpston went on to consider the situation if the policy had been one which imposed a neutral dress code on all employees (this was akin to the facts in *Achbita*). She concluded that such a rule would amount to indirect discrimination against those who sought to manifest their religious belief⁷.

The potential for limiting the manifestation of religion in cases of indirect discrimination was wider than that available pursuant to article 4(1), limitations were required to be objectively justified by a legitimate aim and the means of achieving them were required to be proportionate and necessary, pursuant to article 2(2)(b)(i). Advocate General Sharpston reasoned that protection of an employer's business could be a legitimate aim under article 2(2)(b)(i) so that the right to manifest religion could be limited in the commercial interests of an employer. This would be the case where the employer wanted to project a particular image to his clients or customers. However this was not an absolute principle and for an observant member of a faith religious identity was integral to that person's very being such that the manifestation of that faith would accompany the individual everywhere. Given that the case gave rise to the clash of two protected rights, it was necessary to find accommodation between them.

Proportionality required a balance between the right of the employee to wear religious symbols and the right of the business to impose restrictions⁸. The Advocate General explained that accommodation would involve, for example, requiring an employee to wear a hijab of a particular colour. The employees right to do a job on their own terms was not absolute, however an employee should not readily be told that they could find employment elsewhere⁹. It was necessary to find a solution that lay between these alternatives provided that this did not undermine the aspect of the employee's manifestation of religion that they viewed as essential¹⁰. The balance

⁴ *Bougnaoui*, para 97.

⁵ *Bougnaoui*, para 101.

⁶ *Bougnaoui*, para 108.

⁷ *Bougnaoui*, para 110.

⁸ *Bougnaoui*, para 122.

⁹ This was an endorsement of the decision of the European Court of Human Rights in *Eweida and others v United Kingdom* [2013] ECHR 37; (2013) OJLR 2(1): 218-220

¹⁰ *Bougnaoui*, para 128.

would favour the employee where the employee sought to wear only some form of headgear that left the face and eyes entirely clear, there was no justification for the prohibition of the wearing of such headgear. In the last resort, the business interest in generating maximum profit should give way to the right of the individual employee to manifest their religious convictions. Where a customer of the business placed a requirement on the business based on prejudice relating to one of the protected characteristics it was dangerous to allow an employer to discriminate against an employee in order to pander to that prejudice.

The judgment of the CJEU in this case is awaited at the time this case comment was authored.

Achbita

The question referred to the Court in the *Achbita* case was whether the measure in place gave rise to direct discrimination.

Although the reference was concerned with employment in the private sphere, Advocate General Kokott first considered France's argument that article 4(2) TEU, which requires the Union to respect member state identities inherent in their fundamental structures political and constitutional, combined with article 3(1) of the Directive, which states that the Directive only applies to areas within EU competence, meant that the Directive had to give way to a state's constitutional principle of secularism (*laïcité*) concerning employment in the public sphere.

In response to this argument Advocate General Kokott opined at paragraph 32:

'The European Union's obligation under Article 4(2) TEU to respect the national identities of its Member States does not in itself support the inference that certain subject areas or areas of that directive must not adversely affect the national identities of the Member States. National identity does not therefore limit the scope of the Directive as such, but must be duly taken into account in the interpretation of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment.'

Advocate General Kokott was of the same opinion as Advocate General Sharpston that the term 'religion' in article 1 of the Directive included not only the faith of an individual (*forum internum*) but also the practice or manifestation of that religion (*forum externum*). Further that the wearing of a headscarf was a manifestation of religious belief.

Referring to previous Court of Justice case law under the Directive Advocate General Kokott acknowledged that where a measure was inseparably linked to the relevant reason for difference in treatment, the court had always found discrimination to be present¹¹. She distinguished these cases from Ms Achbita's case on the basis

¹¹ For example *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (C-177/88), [1991] IRLR 27, paras 12 and 17 and more recently *CHEZ Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia* (C-83/14) [2015] IRLR 746, paras 76, 91 and 95.

that they were related to an individual's 'immutable characteristics' either physical or personal, such as gender, age or sexual orientation, rather than on modes of conduct based on 'a subjective decision or conviction', such as the wearing or not of a head covering. In her opinion since this was not a case concerned with immutable characteristics it could not constitute direct discrimination.

In any event the fact that the ban related to all religious symbols, not just the wearing of the hijab, so that it could affect a Christian wearing a crucifix or a Jew wearing the kippah or Sikh who wished to wear a Dastar (turban) and it applied to political and philosophical beliefs meant that it was accordingly 'neutral from the point of view of ideology',¹²

Explaining at paragraph 52:

'that requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee ... '

The Advocate General acknowledged that if the policy were aimed at those with religious beliefs alone then it would be appropriate to assume direct discrimination based on religion. In this case, however, given the broad scope of the measure, the comparator applied to discern whether there had been discrimination was between an employee who did not wish to express any form of belief and one who did. The difference in treatment between these groups was not made on the basis of religion and therefore there was no direct discrimination.

Having found there was no direct discrimination and accordingly answered the question posed by the referring court, Advocate General Kokott then went on to consider the situation in respect of indirect discrimination on the basis that Ms Achbita may have been put at a particular disadvantage as a result of the policy. She concluded that even if there were indirect discrimination it was justified.

This was because the measure pursued the legitimate aims of being genuine and determining occupational requirements pursuant to article 4(1) of the Directive and they were necessary for the protection of the rights of others pursuant to article 2(5), namely the right of the company to run its business.

The Advocate General pointed out that the practice of the national courts on the issue of legitimate aim was inconsistent; Centrum (the interested party), Belgium and France were of the view that the aim was not legitimate, the Commission was sceptical on the point. Only G4S was of the view that it was legitimate.

Advocate General Kokott opined first that the measure could be considered legitimate as a genuine and determining occupational requirement. This was because a genuine occupational requirement could relate not only to the operational processes but also the context in which the activities were carried out and the conditions under which services were provided¹³. An undertaking might legitimately decide to pursue a policy of neutrality and thereby require its staff to refrain from

¹² *Achbita*, para 51.

¹³ *Achbita*, paras 74-75.

wearing symbols that demonstrated any form of ideology. Difference in treatment in this regard could be justified on economic or business grounds under strict conditions laid down by EU law.¹⁴

Advocate General Kokott reasoned that the employer must be allowed a degree of discretion in the pursuit of its business on the basis of **‘the fundamental right of freedom to conduct a business’**¹⁵ [my emphasis added]. She opined that an employer may require its workers to behave and dress in a particular way at work in circumstances where the company had a policy which it had formulated in particular where employees came face to face with customers. Therefore the ban could be a genuine and determining occupational requirement.

The Advocate General went on to explain that the imposition of a dress code could only be legitimate if it was in itself legitimate and complied with EU law. A business could not promote an inhuman ideology but could take into account the views of its customer and business partners, although it could not pander blindly to every demand¹⁶.

Her view was that the policy of neutrality was ‘absolutely crucial’ to G4S because of the variety of customers it served and the special nature of its work, namely the constant face-to-face contact with external individuals. This had a defining impact on G4S itself and that of its customers. It was important that G4S customers should not be associated with the religious or political beliefs of their staff¹⁷.

Importantly at paragraph 99:

‘In a case such as this, the proportionality test is a delicate matter in the context of which the Court of Justice, following the practice of the ECtHR in relation to Article 9 ECHR and Article 14 ECHR should grant the national authorities, in particular the national courts, a measure of discretion which they may exercise in strict accordance with EU rules. In this regard, the Luxembourg Court does not necessarily have to prescribe a solution that is uniform throughout the EU. Rather, it would be sufficient for the Court to indicate to the national court all of the material factors that it must take into account in carrying out the proportionality test but otherwise to leave to that court the actual task of striking a balance between the substantive interest involved.’

The ban was in the opinion of the Advocate General appropriate for achieving the legitimate aim specified and was consistently applied and necessary for achieving the stated aim of an employer’s policy of neutrality amongst all its staff, any other accommodation would defeat this objective.

Her opinion was that since religion, unlike sex, skin colour, age or a person’s disability, was not an unalterable fact but was something an employee ‘could leave at the door’ upon entering their place of work, an employee could be expected to moderate their expression of religion in accordance with an employers requirements.

¹⁴ *Achbita*, para 79.

¹⁵ *Achbita*, para 81.

¹⁶ *Achbita*, paras 88-89.

¹⁷ *Achbita*, para 94.

The decisive criteria in determining the proportionality of the restriction upon the employee was how visible and conspicuous the manifestation was. Employees required to wear uniform could expect greater restrictions placed upon them. Those working higher up in the corporate hierarchy and those with external facing roles could expect greater limitations on their religious freedom. It was important to consider whether as a result of the restriction of religious freedom other restrictions, such as those on grounds of sex, were also present. Also it was appropriate to consider the broader context of the conflict between the employer and the employee. According to Advocate General Kokott it was not appropriate to rush to the conclusion that such a measure made it unduly difficult for Muslim women to integrate into work and society and it was important to bear in mind the constitutional settlement in place within a member state and in which the business operated, this might make it more appropriate to impose a restriction in some states rather than others.

Advocate General Kokott concluded that although it was for the member state to resolve the matter, in her opinion such a ban as that proposed by G4S did not unduly prejudice the interests of the employee and was accordingly proportionate and therefore a justified interference in Ms Achbita's freedom to manifest her religion.

With regard to justification on the basis of article 2(5) (rather than article 4(1) dealt with above) it could not be ruled out that article 2(5) permitted a derogation from the prohibition against discrimination, where an employer was claiming freedom to conduct a business. Such a measure, however, had to be authorised by a public authority. A rule, such as the measure implemented by G4S, had not been issued by a public authority and article 2(5) did not therefore add anything over and above the principles applied pursuant to article 4(1).

The judgment of the CJEU in this case is awaited at the time this case comment was authored.

Analysis

There are instantly identifiable differences between these two cases. *Achbita* concerns a general policy applicable to all employees, prohibiting the expression of not just religious beliefs but political and philosophical ones as well. In *Bougnaoui* the measure is, on one interpretation, just limited to Mrs Bougnaoui or, on another interpretation, limited to the manifestation of religious beliefs. Both cases are distinguishable from case law covering employment in the public sphere. This is because the courts, both national and regional (the ECtHR) have established that it is acceptable in some states (although not in Denmark, the Netherlands and the United Kingdom¹⁸) that different policy considerations apply in the public sector where the state can go further to impose its own ideological foundations for

¹⁸ *Bougnaoui*, para 39.

governance on those working in its service¹⁹. In France, where the Laic model is in place in the regulation of relations between the state and individuals in the public square, public authorities can refuse to allow their employees to wear religious symbols or garments. This occurred most recently in *Ebrahimian v France* [2015] ECHR 1041 where a social worker was according to the ECtHR legitimately dismissed for refusing to take off her hijab when a patient explained their discomfort at being dealt with by someone in this attire²⁰.

The differences between the facts of *Bougnaoui* and *Achbita* could ultimately lead the court to come to different conclusions as to whether there was direct or indirect discrimination. However to find that the interference with religious freedom rights was justified in either case would involve the court at some point in ignoring the essence of the nature of the right to manifestation of religion, denying the relationship of religious belief to human dignity and according too much weight to business interests in the balancing exercise.

In both cases the Advocate Generals focussed on the measure as a genuine and determining occupational requirement and it was clear from their conclusions that they came from directly opposed theoretical standpoints concerning the status of religious freedom as a protected characteristic and the nature of that right. It is this difference that has implications more broadly because it demonstrates how difficult it will be moving forward for the Court of Justice to adjudicate in this area, in particular in view of the fact that according to article 17 TFEU (and not only article 4 TEU), the EU does not (theoretically) engage in matters concerning religion. When the issue is not only related to the individual manifestation of religion but the case concerns criteria related to the constitutional settlement in place between member states and their citizens then the Court is touching on the very essence of that which relates to member state sovereignty. (Taking account of the varying member state constitutional settlements was suggested by Advocate General Kokott in her criteria for determining justification for the interference with religious freedom). It is here that neo-functional arguments supporting uniform approaches in the interests of general economic well-being are at their weakest and are unlikely to override deeper constitutional concerns. Similarly arguments concerning solidarity of the Union will likewise struggle to triumph. This is because finding a compromise which involves levelling up or levelling down in terms of the public acceptance or otherwise of religion is unlikely to be acceptable to the cross section of constitutional settlements within member states²¹ and also because it is unnecessary and potentially

¹⁹ The distinction between the application of *laïcité* in the public and private spheres is further discussed by Eoin Daly, 'Laïcité in the Private Sphere? French Religious Liberty After the Baby-Loup Affair' (2016) OJLR 5(2): 211.

²⁰ *Ebrahimian v France* [2015] ECHR 1041; (2016) OJLR 5(2): 365-366. See also the case comment by Sabina Garahan 'A right to Discriminate? Widening the Scope for Interference with Religious Rights in *Ebrahimian v France*' (2016) OJLR 5(3): 352-358.

²¹ Various constitutional models demonstrating a variety of constitutional settlements between the state and citizens vis-à-vis religion are in place throughout Europe: see Rex Ahdar and Ian Leigh (2013) 'Models of Religion-State Relations', Chapter 4 in *Religious Freedom in the Liberal State*, Oxford University Press, Oxford 87-124. Although contrast Norman Doe (2011) *Law and Religion in*

damaging. As McIlroy notes when writing on the concept of sphere sovereignty and subsidiarity, maximising local governance is optimum for the well being of humankind²². This is particularly so when it comes to individual and group enjoyment of religious freedom. Many EU citizens who hold a faith may well have already taken decisions which preference faith over economic well-being²³. Where this attitude within a state is strong it will not necessarily tow the EU line if it feels the essence of its constitutional settlement vis-à-vis religion interfered with. This is not to deny the importance of basic levels of economic well-being but to recognise that human choices are not always primarily driven by this goal.

It is the opposing views of the nature of religion as a protected characteristic that mark this deep difference of ideology between the Advocate Generals. These are expressed as follows:

Advocate Kokott in *Achbita* at paragraph 116 states:

‘However, unlike sex, skin colour, ethnic origin, sexual orientation, age or a person’s disability, the practice of religion is not so much an unalterable fact as an aspect of an individual’s private life, and one moreover, over which the employees concerned can choose to exert an influence. While an employee cannot ‘leave’ his sex, skin colour, ethnicity, sexual orientation, age or disability ‘at the door’ upon entering his employee’s premises, he may be expected to moderate the exercise of his religion in the workplace, be this in relation to religious practices, religiously motivated behaviour or (as in the present case) his clothing.

Advocate General Sharpston on the other hand at paragraph 118 of *Bougnaoui* states:

‘Here, I emphasise that, to someone who is an observant member of a faith, religious identity is an integral part of that person’s very being. The requirements of one’s faith – its discipline and the rules that it lays down for conducting one’s life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours. Of course, depending on the particular rules of the religion in question and the particular individual’s level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely wrong to suppose that, whereas one’s sex and skin colour accompany one everywhere, somehow one’s religion does not.’

Advocate General Kokott’s opinion is contradicted by empirical evidence over centuries indicating that individuals are prepared to suffer martyrdom rather than

Europe, A Comparative Introduction, Oxford University Press, Oxford, 1-2, who downplays this difference and finds strong similarities in approach.

²² David McIlroy ‘Subsidiarity and Sphere Sovereignty: Christian Reflections on the Size, Shape and Scope of Government’, (2003) 151 Law and Justice 111 - 136

²³ 74% of EU citizens claim to adhere to the Christian faith.

deny their faith²⁴, and would certainly be prepared to leave employment rather than refrain from doing so²⁵.

It would be illogical to conclude that faith could be left at the door by an employee of a particular faith when, in some parts of the world, faith was so essential to the very being of adherents to their faith that they were prepared to die for it. Even in situations where the issue is not one of life or death, empirical research has demonstrated that employees choose to leave their employment rather than disengage with the symbols or practice of their faith²⁶. As Advocate General Sharpston pointed out it cannot be said that faith is something one can leave at the door of one's work.

Advocate General Kokott takes her ideological approach to religion as a protected characteristic further when she equates the restriction on the expression of political and philosophical belief with that of religious belief. The European Court of Human Rights has ruled in *Eweida* that a manifestation of belief must reach a certain level of cogency to be accorded protection under article 9 of the ECHR, the same would go for a political or philosophical belief. In considering whether a particular manifestation of religion could gain the protection of article 9 it explained that a 'manifestation' of religion had to be intimately linked to the religion or belief in so far as there had to be a sufficiently close and direct nexus between the act and the underlying belief, which had to be determined on the facts of each case. There was, in particular, no requirement on the applicant to establish that he or she acted in fulfillment of a duty mandated by the religion in question²⁷.

While it has been established that political and philosophical beliefs are protected along with religious beliefs under both article 9 ECHR and equality legislation, demonstrating that a particular manifestation has such a close connection that an employee is required to manifest that belief at work is more difficult to imagine. It is difficult to think of examples of manifestations of political or philosophical belief that would reach the level of cogency and demonstrate a sufficiently close and direct nexus between the act and underlying belief such that it would give rise to protection under the Equality legislation in a work environment. Usually this type of belief is protected by way of the right to freedom of expression, pursuant to article 10 ECHR

²⁴ The Vatican puts the figure of Christian martyrs at 100,000 a year. <http://www.bbc.co.uk/news/magazine-24864587>. OpenDoors puts the figure at 322 Christians per month: <http://tinyurl.com/jpyavyx> with 772 per month suffering some form of violence. Research puts the figure of Christians martyred since the time of Jesus at 70 million: <http://tinyurl.com/zpjeky6>. This is greater than the population of the United Kingdom (64 million) and France (66 million) and over six times the population of Belgium (11 million). These are just the statistics for martyrs of the Christian faith. See also the Prince of Wales, Thought for the Day 22 December 2016: <http://www.bbc.co.uk/programmes/p04m6dlk>

²⁵ Advocate General Kokott's reasoning has been described as an aberration and directly contrary to European values: Brasseur Guillaume 'Le droit européen de la discrimination, un maelström d'incohérence? Entre beaux principes et réalités pratiques', Masters dissertation. (Louvain): <http://tinyurl.com/j5ams3x>

²⁶ The Reverend David Randolph-Horn 'Spirituality at Work: Perspectives of Christians, Muslims and those of General Spirituality and Belief'. PhD thesis (2015) Leeds Beckett University: <http://tinyurl.com/z4crro7>.

²⁷ *Eweida et al v United Kingdom* [2013] ECHR 37; (2013) OJLR 2(1): 218-220, paras 81-82.

rather than pursuant to article 9 ECHR.²⁸ The question as to whether there has been discrimination therefore needs to focus on those with cogent beliefs which require manifestation within a work environment which come within the remit of legislation as protected characteristics and compare them with those who do not²⁹.

The importance of religious belief to human identity and dignity is demonstrated in rights theory and international rights instruments that accord freedom of religion the status of a fundamental right, although the manifestation of that right can be subject to limitations. To raise, as advocate General Kokott does, the freedom to run a business to the status of 'fundamental' human right and down grade freedom of religion as a protected characteristic is to accord too high a status to business freedom particularly in the context of the horizontal application of fundamental rights law which is the situation in the *Achbita* and *Bougnouli* cases. The Charter of Fundamental Rights of the European Union is addressed to member states and EU institutions, it has vertical application, that is application between citizens and the member states or the institutions of the EU. By bringing it into play in the balancing of Charter rights under equality legislation this results in the horizontal application of rights between private individuals, including corporate individuals. If the companies can call article 16, freedom to run a business into aid, then, depending on how the horizontal application of fundamental rights operates within a member state, the employees could potentially call article 15, 'the right to engage in work and to pursue a freely chosen or accepted occupation' into aid.

Where a company denies an individual the right to manifest their religion and that individual is thereby obliged to leave their employment the company is interfering with their right to engage in work and pursue their accepted occupation. This is particularly so if, as Advocate General Sharpston opined, the corporate policies established by G4S and Micropole become the norm. Individuals could eventually be unable to find employment in their chosen profession elsewhere. This demonstrates the impact of what has been described as 'rights inflation' and an expansive view of rights and the role of the judiciary in adapting rights frameworks³⁰.

The balancing of fundamental civil rights in the present cases indicates the effect that economic integration at a supranational level has had upon the understanding of human dignity and the worth of individuals where law is primarily economic in its underlying rationale³¹. Even though the EU has sought for some time to move

²⁸ For example an attempt by an Irish Republican prisoner to exercise the right to wear an Easter Lily was considered under article 10 ECHR: see Neil Graffin (2012) 'Donaldson v United Kingdom: No right for prisoners to wear Easter Lilies'. KJL 23(1): 101-108.

²⁹ The extent to which beliefs are protected pursuant to UK equality legislation is discussed by Professors Peter Edge and Lucy Vickers (2016) in their 'Review of equality and human rights law relating to religion or belief.' Equality and Human Rights Commission Research report 97, 15-21: <http://tinyurl.com/z9pltop>. The criteria for 'belief' in the UK are that it must be genuinely held; it must be a belief and not an opinion; it must concern a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society, not be incompatible with human dignity or conflict with fundamental rights: *Grainger Plc v Nicholson* [2010] IRLR 4, explained in Edge and Vickers (2016), 16-18.

³⁰ See for example Kai Möller (2012) *The Global Model of Constitutional Rights*. Oxford University Press, Oxford.

³¹ Academic commentators continue to put forward various underlying theories supporting the structure of the European Union ranging from forms of federalism through to inter-governmentalism.

beyond the theoretical foundations of functionalism and neo-functionalism as providing an underlying rationale for action and has introduced the Charter of Fundamental Rights and policies to flank factor mobility there are still strong underlying tendencies and reasoning within the Court of Justice which reinforce uniformity, integration and its economic rational³². Combined with a failure by policy makers and institutions to more conscientiously apply the doctrine of subsidiarity, in particular after the Treaty of Lisbon, this means that potentially past jurisprudence combined with present fundamental rights provisions could now enable the Court of Justice to raise freedom to run a business to a higher level than a long acknowledged fundamental civil and political right³³.

The point of human dignity is that the human being is seen as of value in and of themselves whether from a theological point of view or otherwise³⁴. Human rights seek to avoid the instrumentalisation of human beings. While it is of course important that an economy functions and businesses can thrive, there is no suggestion that this is incompatible with the enjoyment of the existing body of fundamental rights. On the contrary there is evidence that where freedom of religion is practiced within a corporate set up business in fact thrives³⁵. This is achievable without according business freedom the status of a fundamental right.

This distinction between the positions of each Advocate General is of importance because it establishes a distinct starting point. If one recognises faith as intrinsic to an individual and to their dignity, the extent to which one can interfere with that right is very limited. If one considers faith as non-essential then even if direct or indirect

What is clear from the reasoning of the Court of Justice is that the Court will bear in mind the need to further the integrative purposes of the Union and work for cohesion: Robert Schütze (2015) *European Union Law* Cambridge University Press, Cambridge, 43-76. Damien Chamlers, Gareth Davies and Giorgio Monti, *European Union Law*, (2014) 3rd ed, Cambridge University Law, Cambridge, 4-11 and 14-19, Paul Craig and Grainne De Burca *EU Law Text, Cases and Materials*, (2015) 6th ed, Oxford University Press, Oxford, 23-27. Gunnar Beck (2012), *The Legal Reasoning of the Court of Justice of the EU*. Hart Publishing, Oxford.

³² For example the *Cassis de Dijon* line of cases applicable in the field of free movement of goods, and the principles subsequently applied in other areas of factor mobility: *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979) Case 120/78, [1979] ECR I-649

³³ Nicholas Wolterstorff grounds rights in the respect due to the worth of the rights-holder and, taking a Christian theological approach, connects this with God's relationship with humankind: see Nicholas Wolterstorff (2008) *Justice Rights and Wrongs*, Princeton University Press, Princeton and Oxford, 2008. Ahdar and Leigh (2013) in Chapters 2 and 3 examine historical and present day justification for religious freedom. These accounts do not sit well with a theory that incorporates the running of a business for profit as a **fundamental** right in a balancing exercise with religious freedom. While some form of accommodation between a corporation and employee may well be necessary, to allow the profit motive to enter the exercise of accommodation as a fundamental right is to balance the scales unfairly.

³⁴ For a philosophically sophisticated and nuanced exploration of the grounding of rights see Wolterstorff, in particular 313 et segue.

³⁵ For example Dr Brian Grim's work at the Religious Freedom and Business Foundation: see, for example, <http://religiousfreedomandbusiness.org/religions-economic-value> and Economy with a Truly Human Purpose: <http://www.newyorkencounter.org/2017-economy-with-a-truly-human-purpose/>. See also Apostolic Exhortation *Evangelii Gaudium* of the Holy Father Francis to the bishops, clergy, consecrated persons and the lay faithful on the proclamation of the gospel in today's world: <http://tinyurl.com/hhyf9za>, chapter 2.1 Some Challenges of Today's World.

discrimination comes into play, the right to express that freedom of religion can be more easily denied because other 'essential' rights can by their very nature trump it or limitations can be more easily justified or weighed in the balance.

There is, however, no indication in the legislation that religion is any less of a protected characteristic than other protected characteristics such as sex, skin colour or sexual orientation and to so find would result in the Court stepping outside the tools of statutory interpretation available to it³⁶ and take it beyond the policy making role it has on occasion assumed for itself³⁷. This is because it would be realigning the system of fundamental rights protection in place at a regional and international level. This goes beyond causing a constitutional restructuring such as that put in place at the time the Court established direct effect³⁸ indirect effect³⁹ and bolstered factor mobility⁴⁰. It involves the court in unravelling the system that was put in place to ensure that never again could a sector of society gain such power that it could trample on human dignity and abuse rights essential to humankind. These norms sit above individual constitutional settlements at both regional and international levels and it would be inappropriate for the CJEU, in an area in which technically the EU does not have competence and when addressing the horizontal application of rights, to interfere with norms of such import. This is reinforced by article 53 of the Charter of Fundamental Rights of the EU, this states:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

Of importance in Advocate General Sharpston's opinion⁴¹ and absent in Advocate General Kokott's opinion is the comment that not all individuals of a particular faith will adhere to all the various manifestations of that faith, and while some may move into a deeper observance, others may pull out of it⁴². To assume as Advocate

³⁶ Beck (2012) identifies a cumulative approach to judicial reasoning in cases where the CJEU is dealing with constitutional or human rights issues which involves it emphasising a purposive approach based inter alia on conceptual vagueness and 'value pluralism'.

³⁷ *Van Gend en Loos v Nederlandse Administratie der Belastingen* Case C-26/62 and subsequent authority: see Beck, p 299.

³⁸ *Van Gend en Loos*

³⁹ *Von Colson and Kamann v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891 and *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135

⁴⁰ *Cassis de Dijon*

⁴¹ *Bougnaoui*, para 29.

⁴² *Bougnaoui*, para 29. 'It is often (perhaps generally) the case that not all of a particular religion's compendium of religious practice is perceived by someone who adheres to that religion as absolutely 'core' to his or her own religious observance. Religious observance comes in varying forms and varying intensities. What a particular person treats as essential to his or her religious observance may also vary over time. That is because it is relatively usual for levels of personal belief, and hence of personal observance associated with that belief, to evolve as a person passes through life. Some become less observant over time; others, more so. ... the level of religious observance may likewise fluctuate over the course of the religious year. An enhance level or observance – which the

General Kokott does that just because an individual does not adhere to every tenet of the faith over a period of time that faith cannot be essential to the individual ignores the well-documented manner in which individuals grow and develop within their faith⁴³.

If the CJEU were to follow the logic of Advocate General Kokott's opinion it would involve it not only altering the structure of fundamental rights protection within a considerable portion of Council of Europe states, ignoring the role that religion plays in the dignity and very being of those who hold a faith and ignoring the manner in which those of faith can develop over time, but it would also involve it stepping outside its usual *modus operandi*. This is because Advocate General Kokott suggested a non-uniform approach sensitive to individual member states settlements vis-à-vis religion would be acceptable. The CJEU has consistently refused to take such an approach, having an overarching policy of uniformity, solidarity and cohesion of the Union in their decision making⁴⁴.

The Advocate General refers to the acceptability of member states applying individual approaches to this area so that they could take into account the particular ideology within a member state. This is despite the fact that those states making representations in the *Achbita* and *Bougnaoui* cases, including France, did not want the matter resolved in a way that would enable businesses to apply state ideology within a private corporate context.

Permitting an individual state approach would give rise to an additional problem in that it would enable the court to absolve itself from assessing whether a state ideology itself might breach international rights norms – a function with which, as a result of incorporation of religious freedom as a protected characteristic in anti-discrimination legislation and attempts by private corporations to apply state ideology to employees, it is charged under the Directive.

On a practical level this is problematic because even if the Court of Justice could break with tradition and allow a non-uniform approach to the interpretation of the Directive, over time the Court has shown a tendency to chip away at a position until the state of affairs it seeks to achieve becomes acceptable to member states – by ruling that a 'neutral' policy was acceptable for private corporations within one member state, this would be a first step potentially on the road to a secular/laic approach in the adjudication of such disputes where uniformity was eventually imposed.

Second, practically, an individual state approach would make it difficult for multinational companies operating across Europe since employees within different states would have different policies applied to them and employees who crossed borders would be able to put on or have to take off religious attire in accordance with the requirements in place. The corporate image that weighed so heavily in the

practitioner may feel it appropriate to manifest in a variety of ways – may therefore be associated with particular points in the religious year'

⁴³ See for example James Fowler's Stages of Faith: <http://tinyurl.com/odby8q6>

⁴⁴ Beck (2012), 319, describes the reference to 'ever closer union' in the preambles of the TEU and the TFEU as the *leitmotif* which pervades the actions and decisions of the EU institutions.

balance in Advocate General Kokott's opinion could not actually be achieved for multi-national companies where differences within member states were allowed⁴⁵.

The requirements on the Court of Justice in terms of the context in which it decides cases may therefore hamper its ability to allow states' ideological difference when it comes to religious freedom in a corporate context. This contrasts with the European Court of Human Rights, this can accord member states a margin of appreciation where, in the absence of consensus, it feels that the individual state has not overstepped the boundary in terms of infringing an individuals' fundamental rights⁴⁶. This greater freedom on the part of the European Court of Human Rights to permit national difference flows from the nature of its remit – its focus is on rights protection alone.

If the court is compelled to take a uniform approach to the issue, on the basis that those member states that were party to the cases would support a finding of either unjustified direct or indirect discrimination this would not cause it to be at risk of upsetting member states with such a finding. It would not impinge on existing state ideology applied in public employment nor that applied in public life and to that extent would allow national difference. The uniform approach would occur in refusing to allow customers of private businesses to demand racist policies in respect of that employers' staff. It would also not be at risk of undermining the external relations work of the EU in the field of religious freedom and in particular the work of Dr Ján Figel', the EU Special Envoy for Religious Freedom outside the EU. Its internal policy would coherently support tolerance between those of all faiths, in the corporate sphere at least, and also boost religious freedom more generally, which in the view of the EU Special Envoy is essential if other fundamental rights are to be protected⁴⁷. The EU Guidelines for the Protection and Promotion of Freedom of Religion and Belief explain at 1.A.1 that:

'Violations of freedom of religion or belief may exacerbate intolerance and often constitute early indicators of potential violence and conflicts.'⁴⁸

⁴⁵ As Advocate General Sharpston points out in *Boungaoui*, para 36, member states' treatment of the wearing of religious apparel differs widely from state to state. Blanket bans on the face veil in public exist in France and Belgium. In Germany for public sector teachers to be denied the right to wear a religious symbol there has to be specific identifiable risk. In Denmark, the Netherlands and the UK there are no restrictions and also no formal distinctions between employees in public and private sector

⁴⁶ Comparative analysis on the operation of the ECtHR and the CJEU in the field of religious freedom protection has been undertaken in a series of articles published in the Oxford Journal of Law and Religion and introduced by Katayoun Alidadi and Marie-Claire Foblets, *European Supranational Courts and the Fundamental Right to Freedom of Religion or Belief: Convergence of Competition?* (2016) OJLR 5(3): 532-540. The *Achbita* and *Boungaoui* cases are discussed in this series by Eugenia Relaño Pastor *Towards Substantive Equality for Religious Believers in the Workplace: Two Supranational European Courts, Two Different Approaches*. (2016) OJLR 5(2): 255.

⁴⁷ Dr Ján Figel', EU Special Envoy for Freedom of Religion outside the EU at the OpenDoors National Conference, Archbishop's Palace Vienna November 2016 : <https://www.youtube.com/watch?v=NYojlodpxIs>. Opening of the European Academy of Religion in Italy December 2016: https://www.youtube.com/watch?v=QE_-0tpmEfE. Institute for Cultural Diplomacy: Annual Conference January 2017: <https://www.youtube.com/watch?v=iimjLKoGk6g>.

⁴⁸ EU Guidelines for Protection and Promotion of Freedom of Religion and Belief. Council of the European Union (2013/2082(INI)). <https://eeas.europa.eu/sites/eeas/files/137585.pdf>

It is on the basis of this message that the EU seeks to reach out to third countries. Annicchino points to both the importance of and challenges in creating internal and external coherence in the field of religious freedom within the EU⁴⁹. Coherence and credibility would, however, seem vital in order to gain respect and enter into dialogue with third countries. Annicchino suggests that:

‘there must be room for a degree of pluralism in modes of bringing religious freedom and other fundamental human rights to life under diverse cultural circumstances. Those elements, if any, that European societies seek to agree upon as common may at least serve as minimum standards for the protection of freedom of religion or belief. To this extent, a minimum degree of coherence and consistency is required. It would otherwise be impossible to include the protection of freedom of religion or belief as one of the pillars of EU external human rights action.’⁵⁰

Without this as Marco Ventura writes:

‘Europe lacks the credibility and authority to denounce and counter violations in other parts of the world’.⁵¹

In the event that the court does opt to allow member states to take different approaches in this regard and enable national courts to permit discrimination of the nature demonstrated in the two cases being considered, it would then perhaps be time to re-examine the notion of ‘neutrality’ and ‘secularism’ in more detail from a philosophical and ideological perspective. If it enables either a nation state or private enterprise to drive religion out of the public sphere it then becomes a single concept ideology of its own – its own belief system that operates to the exclusion of all others. Not only does this ignore the fact that 84% of the world’s population according to the Pew Report⁵² acknowledge allegiance to one form of religion or another, within the European Union 74% are adherents to the Christian faith, but it also makes a claim that theoretically, practically and historically has not borne fruit over time – traditionally where freedom to manifest religion in public life is restricted other rights abuses have followed and society deteriorates.

⁴⁹ Pasquale Annicchino *Coherence (and Consistency) or Organised Hypocrisy? Religious Freedom in the Law of the European Union*, in Marie-Claire Foblets, Katayoun Alidadi, Jørgen S Nielsen, Zeynep Yanasmayan (eds) (2014) *Belief, Law and Politics, What Future for a Secular Europe?*, Ashgate, Farnham, 257-263. The three pillars of coherence identified by Annicchino in Marise Cremona’s work (Foblets et al (2014), 258) would be missing in Advocate General Kokkots approach, there would first be a lack of consistency in the rules for avoiding conflict. Second, there would be a lack of rules of hierarchy – with the balancing of a Charter right not usually set in the hierarchy of fundamental rights (freedom to run a business) accorded the status of fundamental right and weighed against a down graded religious freedom equality right and third a lack of synergy between norms, actors and instruments with freedom of religion being accorded a different treatment within the European Convention of Human Rights and other international instruments. See also Annicchino ‘A transatlantic Partnership for International Religious Freedom? The United States, Europe, and the Challenge of Religious Persecution’. (2016) OJLR 5(2): 280, 287-289.

⁵⁰ Annicchino in Marie-Claire Foblet et al (2014), 262-263.

⁵¹ Annicchino in Marie-Claire Foblet et al (2014), 263.

⁵² <http://www.globalreligiousfutures.org>

A way forward can be found in the work of the Equalities and Human Rights Commission in the UK which is currently looking to improve understanding in the practice of employers in managing religious diversity in the workplace and balancing that right with other rights; creating a balanced public dialogue on religion and belief matters and; assessing the legal framework in the field⁵³. The last of these tasks was addressed by Edge and Vickers in a report for the Commission in 2015⁵⁴. Further inspiration for fostering religious tolerance generally can also be found in the work of the Commission on Religion and Belief in Public Life⁵⁵ and, within the work place, in the literature on reasonable accommodation both in the US, Canada and Europe⁵⁶.

Conclusion

This case comment has contrasted the opinions of Advocate General's Sharpston and Kokott in the *Bougnaoui* and *Achbita* cases in order to highlight some of the issues raised by them. In particular the importance of religious belief to the concept of human identity and dignity and the problems that might arise if the CJEU were to raise business freedom to the level of fundamental right in the light of rights protection generally and in the balancing of rights exercise it has to undertake under equality legislation. It also examined the difference between the ability of the ECtHR to apply the margin of appreciation and the limits on the CJEU in the application of a non-uniform approach to decision making. It suggested that the CJEU should not avoid examining state ideology where it comes into play in cases arising under anti-discrimination legislation where that state ideology itself might infringe international fundamental rights norms. This might require the CJEU to reassess the notion of 'neutrality' and 'secularism' as an ideological concept, which effectively excludes all other ideologies but its own from the public square. It then considered the importance of coherent internal and external freedom of religion policies if the EU Special Envoy for Freedom of Religion is to be able to go out with credibility to third countries. It is hoped that the Court of Justice in its rulings in *Bougnaoui* and *Achbita* will chose an approach which accords with member states views, reinforces freedom of religion and hence tolerant living together and creates internal and external coherence for freedom of religion and belief.

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⁵³ Shared understandings: a new EHRC strategy to strengthen understanding of religion or belief in public life. (2013); Perfect 2014.

⁵⁴ Peter Edge and Lucy Vickers. Review of equality and human rights law relating to religion or belief. Equality and Human Rights Commission. Research report 97 (2015).

⁵⁵ <http://www.corab.org.uk> In particular see the Living with Difference Report: <http://tinyurl.com/h22hb22>

⁵⁶ See, for example, the series in (2016) OJLR 5(2) and 5(3). In particular Ann Power-Forde Freedom of Religion and 'Reasonable Accommodation' in the Case Law of the European Court of Human Rights'. (2016) OJLR 5(3): 575.